1957

Earl Rich v. Ernest Elder : Brief of Respondent

Utah Supreme Court

Therald J. Jensen; Attorney for Plaintiff and Respondent;

Case No. 8671

IN THE SUPREME COURT of the STATE OF UTAH

EARL RICH,
Plaintiff and Respondent,

—vs.—

ERNEST ELDER,
Defendant and Appellant.

BRIEF OF RESPONDENT

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PRELIMINARY STATEMENT

This is a very simple case. There are no law issues. The testimony at the trial was short (160 pages of transcript). On the crucial facts the testimony of plaintiff and defendant was in sharp conflict. The trial Judge believed plaintiff and disbelieved defendant and awarded judgment to plaintiff on two of his three causes of action. On plaintiff's other cause of action the trial Judge found plaintiff had not sustained the burden with respect to his claim for compensation for the use of his truck and entered a no cause of action.

Plaintiff does not agree with defendant's statement of the facts.

We do agree with defendant that the only two questions for review are (1) whether plaintiff was employed by defendant from approximately July 10, 1956 to July 18, 1956 in the gathering of certain cattle; and (2) whether defendant was obligated to pay plaintiff a $500.00 bonus on account of an earlier contract of employment. Defendant's four points, both in his statement of points and argument, are directed to these two propositions. We shall meet these two points and issues in the order stated.

We shall refer to respondent Rich as plaintiff, to appellant Elder as defendant, and to defendant Sharp as Sharp.

POINT I.

DID PLAINTIFF BECOME ENTITLED TO A $500.00 BONUS OFFERED BY DEFENDANT IN A LETTER OF JANUARY 17, 1956?

In the month of January, 1956, plaintiff, who was then in the employ of defendant, was about to quit his ranching and cow punching job with defendant. Defendant thereupon wrote a letter to plaintiff (Exhibit P-1):

"January 17, 1956

Dear Earl,

Taking up where we left off today, while I was at the ranch—I think you are well able to assume complete charge of the place. I realize that you might be concerned about how long the job would last. However if it worked out like I think it would the job would be good for quite a long time. *In any event I would be willing to agree to pay you, in addition to salary—five*

hundred dollars—if and at any time I sold the property. Also, as livestock prices improve, which I think is certain—with the politicians getting busy—we could consider some increase in salary. Realizing that you could not handle the place alone—I would be willing to hire Don—for $100.00 per month—to begin immediately. However, before mentioning this to Don, talk to your Dad and Mother about it. Also Buster and the other boys could have a summer job at fair pay, if they wanted it. If you and I reached such an agreement, I would want to reserve the large bedroom behind the kitchen for the permanent use of my family—the rest of the house would be yours to use as you pleased. Of course, this is subject to the fact, that your Dad and Mother would be welcome to remain in the house, as long as they wish—the longer—the better.

Regarding the old equipment about the place, I agree to your breaking it up and disposing of it, however, I think it would be fair to divide whatever you get for it—⅔ to you—⅓ to me.

Let me hear from you.

Yours truly,
Ernest Elder."

Plaintiff did not answer that letter in writing, but shortly thereafter did meet with defendant and discussed the contents of the letter with him and accepted the bonus proposal. The conversation was at the ranch and in connection therewith plaintiff testified:

"A. He [defendant] asked me if his proposition was satisfactory.

Q. What did you say?

A. I told him I guess it was. Yes." (R. 58)

Plaintiff thereupon (1) continued in the employ of

defendant until on or about June 15, 1956 at which time (2) defendant sold the ranch. The two conditions set forth in this offer to pay a bonus were met and plaintiff became entitled to the $500.00 bonus. The trial court stated that it had no hesitancy in deciding this issue in favor of plaintiff. (R. 199)

Now what does defendant say about the bonus in his brief? Under point III at page 13 of his brief defendant says the "only evidence concerning a bonus which was presented by plaintiff was the letter of January 17, 1956" (Exhibit P-1) and he says further that at no time did plaintiff "ever indicate that he would accept the terms and conditions of the letter." Either counsel for defendant failed to read the record or failed to understand it as the quotation from the record page 58 hereinabove set forth fully demonstrates. Plaintiff did accept the terms and conditions of the bonus offer of January 17, 1956.

Defendant urges, however, that there were two further unwritten conditions attaching to the bonus offer:

(1) Defendant says he orally told plaintiff that the bonus would be paid only if plaintiff was not hired by the person to whom defendant might sell the ranch. This condition was not imposed by terms of the letter of January 17, 1956. After hearing the testimony the trial court found that this condition was not imposed by defendant (Findings of Fact, Third Cause of Action).

(2) Defendant says there was also the condition that plaintiff must render *faithful, loyal* and *expert* services in order to become entitled to the bonus. (Brief,

page 5) These specific conditions were not imposed by the letter of January 17, 1956. The court also found that they were not specifically imposed. (Findings of Fact, Third Cause of Action) We have no particular quarrel with the cases cited by defendant or with the law that there is an implied condition that an employee should render his services with reasonable diligence and efficiency. But, there is no evidence whatsoever that plaintiff failed to render reasonably good services to defendant. Plaintiff kept records of the cattle (R. 122, 123), reported weekly to defendant (R. 124), and defendant admits he was so informed (R. 152) and that plaintiff rendered valuable services for him.

Defendant apparently fails to realize the dilemma in which he finds himself: He contends on the one hand that plaintiff is not entitled to the bonus because of lack of performance of good services from January 17, 1956 to June 15, 1956. But, on the other hand during said period of time defendant paid to plaintiff, plaintiff's regular monthly wage without any complaint or intimation of lack of performance of reasonably good services. The same services which earned for plaintiff his regular monthly wage during this period entitled him to the bonus.

Defendant complains that *after* plaintiff ceased to work for him and after defendant and Sharp came into conflict that plaintiff was disloyal in failing to sign a certain affidavit to be dictated by Mr. King which plaintiff interpreted to be a sort of guarantee or assurance with respect to the number of cattle on the open range

in the spring of 1956. (R. 137-141) Defendant offered plaintiff $200.00 if he would sign this document. Plaintiff refused. Neither plaintiff nor any other person could honestly sign any such document. Inasmuch as the cattle were not gathered and counted in the spring of 1956 that data was unavailable. Plaintiff did, however, orally give his opinion as to the number of cattle that might or could have been on the open range in the spring of 1956 (R. 136) and did inform defendant's attorney that if an affidavit were prepared and sent to plaintiff, plaintiff would have his own attorney go over the same and if it were acceptable that the same would be signed. (R. 142-143) Defendant's attorney never did prepare or submit such an affidavit.

This so called "lack of loyalty," ex post facto, could have no bearing on the issue of plaintiffs right to the bonus. That right either materialized or failed on June 15, 1956 and the decision of plaintiff not to become embroiled in the cattle dispute between defendant and Sharp can have no bearing on his right to the bonus. Moreover, it would appear quite unlikely that defendant would stress *loyalty* as a condition of defendant's employment in January of 1956 at which time there was no contract or conflict between defendant and Sharp. Obviously this stress upon loyalty as a condition precedent to plaintiff's right to the bonus is something which occurred to defendant after he and Sharp came to blows. See the testimony of defendant in this connection. (R. 178 et seq.)

On or about July 26, 1956 plaintiff worked two or three days for Sharp in the gathering and removal of certain cattle. Plaintiff was not then employed by de-

fendant and had no obligation, moral or otherwise, to those cattle. Defendant makes the wild and unsupported statement that plaintiff "concealed" from defendant the fact that Sharp removed these cattle from the range on or about July 26, 1956. (Observe that this date is after the cattle were turned over to Sharp and was after plaintiff ceased to work for defendant.) But, the record does not support this statement and on the contrary plaintiff in answer to a question put by defendant's counsel replied: (R. 135)

discuss with defendant the gathering and removal of

"Q. Mr. Rich, did you tell me at that time that you had participated in the removal of two loads of cattle from the range?

A. I did not. You didn't ask me.

Q. I asked you something else though didn't I? I asked you how many cattle there were in the spring of 1956 didn't I?

A. And I didn't know.

Q. You said you didn't know?

A. That's right.

Q. But you gave us an estimate at that time didn't you, Mr. Rich?

A. I did."

Defendant devotes considerable space to the argument that when defendant paid plaintiff shortly after June 15, 1956 for his regular salary that plaintiff did not ask for the bonus and that he was paid in full for services rendered up until that time. Plaintiff was informed even

after the sale was effected that no sale had been made and it is, therefore, understandable why he did not then ask for the bonus.

Defendant deliberately and falsely lead plaintiff to believe that although he had sold the cattle that he was retaining the ranch and that he and Sharp were merely combining their operations and therefore plaintiff was not entitled to the bonus because the ranch had not been sold:

> "A. [By Plaintiff] I don't know who told me, but I thought that Mr. Sharp was out there to take over the management of the ranch. I asked Mr. Elder something to that effect and, if he was, and he said no. That it wasn't like that. Told me that Mr. Sharp had a feed lot in Delta and that he was trying to swing a deal with him to more or less combine the ranches and the feed lot; to better advantage I guess." (R. 60)

It is apparent that defendant believed that if he could mis-inform plaintiff concerning the status of the ranch sale that defendant might in some manner avoid paying the promised bonus. Even as late as August of 1956 when plaintiff called at the home of defendant in Salt Lake City plaintiff again asked defendant whether he was "clear out of it, of the ranch" to which defendant said "no, that he still had his interest there." (R. 61) Defendant himself volunteered that perhaps plaintiff didn't understand that the ranch had been sold. (R. 182) Plaintiff again asked about the bonus during the conference with defendant at the law office of Mr. King. (R. 188)

The testimony of plaintiff is confirmed by the testimony of Sharp: (R. 97)

> "A. Well the first Mr. Elder told me that he, that Mr. Rich had been concerned about his job if he sold the place and that he'd agreed to take care of him. Asked if it was all right if he [defendant] told him [plaintiff] that I had my feed yard in Delta and we figured the two operations to go together would be a benefit to both of us, but I was going to be in full charge of the whole affair. I would manage both places and were just putting a feed yard and ranch together, that I'd bought the cattle.
>
> Q. Well that wasn't the fact was it?
> A. No.
>
> Q. And he asked you if it was all right if he could tell Mr. Rich that?
>
> A. Yes."

Defendant asserts that plaintiff "never made any claim for the bonus prior to the time of the filing of the complaint" (Brief, page 14). The record discloses that plaintiff did inquire concerning the sale and the bonus on more than one occasion prior to the time of the filing of the complaint and on each instance he was deliberately mis-informed by defendant to the effect that no sale had been made and that defendant and Sharp were merely combining their operations. It was in light of this background of wilfull mis-information given by defendant that plaintiff accepted his pay on or about June 15, 1956 without at that time receiving the bonus settlement.

On the entire case it is not difficult to understand

why the trial Judge believed plaintiff and Sharp as against defendant Elder in light of defendant's deliberate mis-statements as well as in light of his contradictory statements. (See the cross-examination of defendant, (R. 176-189)

POINT II.

WAS PLAINTIFF EMPLOYED BY DEFENDANT FROM APPROXIMATELY JULY 10, 1956 TO JULY 18, 1956 IN THE GATHERING OF CERTAIN CATTLE?

Defendant in his brief asserts (1) that plaintiff failed to show a contract of employment between plaintiff and defendant for the gathering of the cattle, and (2) that there was no consideration to the defendant for the promise to pay the cost of the gathering. (Brief, page 6) Defendant then quotes certain portions of the record and says that the evidence in support of plaintiff's position "comes only from the mouths of plaintiff and Sharp." (Brief, page 7) We admit that there is a conflict between plaintiff and Sharp on the one hand and defendant on the other. The trial Judge, however, believed the former and disbelieved the latter.

(1)

Both plaintiff and Sharp categorically state that defendant told plaintiff that defendant would pay the cost of gathering the cattle.

Plaintiff testified: (R. 62)

"Q. All right, what else was said?

A. As I remember it, Mr. Sharp come in then and he said when they go to the mountain to

gather the cows they are working for you [defendant] then. Mr. Elder said yes."

Plaintiff on cross-examination testified concerning a telephone conversation placed between him and defendant on or about July 4, 1956: (R. 66)

"Q. Well this call that you made now, Mr. Rich, you were in doubt as to whether or not you had any authority to hire anybody on behalf of Mr. Elder or authority to charge any groceries to his account or act in any way on his behalf didn't you?

A. I was not.

Q. You just, well then why were you calling him from Wellington to Salt Lake City if you had no doubt about your authority?

A. To get him to confirm my authority to do it. Once more.

Q. Once more, is that right?

A. Yes."

As counsel for plaintiff admits, the testimony of plaintiff on this point is confirmed by the testimony of Sharp. Concerning the conversation at the ranch a few days following June 15, 1956, Sharp testified as follows: (R. 95)

"A. A few days after the 15th he [defendant] told Mr. Rich that I was in charge and would pay them from June 15th on. And we had to get the hay up, and as soon as the hay was finished that he was going back to work for him to gather the cattle.

Q. Now that's what he told Mr. Rich?

A. Yes. Then they went ahead with some other

business, and as we left I repeated again to Mr. Rich, well you're all working for me.

Q. Was Mr. Elder there when you repeated it?

A. Yes.

Q. What did you say?

A. I said, 'Fellows you're working for me during the hay and you go back to work for Mr. Elder on the, when the cattle count starts.'

Q. What did Elder say?

A. O.K. Said yes."

The trial Judge believed the testimony of plaintiff and Sharp. The evidence is substantial and is contradicted only by defendant himself.

(2)

There is absolutely no merit to the contention of defendant that there was no consideration to him for his promise to pay for the gathering of the cattle. If I understand defendant's argument it is that his contract with Sharp did not require him to gather the cattle and therefore even though he did ask the plaintiff to gather these cattle and even though he did agree to pay for the gathering that there was no consideration for the promise to pay. To merely state this argument is to demonstrate its fallacy. Whether defendant was obliged under his contract with Sharp to gather the cattle on the range is wholly immaterial in so far as his obligation to pay plaintiff for the gathering is concerned. The record clearly establishes and the court found that defendant requested

plaintiff to gather the cattle, that he agreed to pay him for the services rendered and that plaintiff did gather the cattle. Most certainly it is no defense to an action on that promise to pay for defendant to now say that as between defendant and Sharp he had no obligation to gather the cattle.

The judgment should be affirmed.

Respectfully submitted,

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